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REVIEW BY THE COURTS OF LEGISLATURE'S DECLARATION THAT AN ACT IS NOT SUBJECT TO REFERENDUM.—In many of the states of our Union, constitutional amendments have been adopted allowing the voters at the polls to enact or repeal state laws by means of the initiative or referendum.[1] Most of these amendments are very similar and, therefore, may be discussed as a unit.

The amendments providing for referendum contain the provision that a certain time must elapse after a statute is passed by the legislature before it becomes effective. Inasmuch as such a delay might prove detrimental in cases of emergency, the amendments except from the referendum those enactments necessary for the immediate preservation of the public peace, health and safety.[2] Naturally the question has arisen as to whether the legislature alone shall be the judge of the existence of such an emergency or

[1] South Dakota, 1898; Utah, 1900; Oregon, 1902; Nevada (referendum only), 1907; Montana, 1906; Oklahoma, 1907; Maine, 1908; Missouri, 1908; Arkansas, 1910; Colorado, 1910; Arizona, 1911; New Mexico (referendum only), 1911; California, 1911; Nebraska, 1912; Washington, 1912; Idaho, 1912; Ohio, 1912; Michigan, 1913; North Dakota, 1914; Mississippi, 1914; Maryland (referendum only), 1915; Massachusetts, 1918.

[2] These words are the usual type employed in such amendments.

whether the judgment of the legislature is subject to review by the judiciary. There seems to be an almost equal array of authority on both sides.

It seems clear that the purpose of the referendum is to reserve to the voters themselves the right to repeal laws passed by the legislature which they deem unwise. It would seem equally evident that if the legislature could at its own discretion declare any act to be necessary for the immediate preservation of the public peace, health and safety and thus remove it from the referendum, the latter might be rendered totally inoperative.

The principal case holding that the courts cannot review the judgment of the legislature is *Kadderly* v. *City of Portland*[3], in which the court in part said:

> "The amendment excepts such laws as may be necessary for a certain purpose. The existence of such necessity is therefore a question of fact, and the authority to determine such fact must rest somewhere. The Constitution does not confer it upon any tribunal. It must therefore necessarily reside with that department of the government which is called upon to exercise the power. It is a question of which the Legislature alone must be the judge, and, when it decides the fact to exist, its action is final."

This decision, however, relies strongly upon the South Dakota case of *State* v. *Bacon*,[4] but the latter case has been expressly overruled by the cases of *State* v. *Whisman*[5] and *Hodges* v. *Snyder*.[6] The states of Arkansas[7] and Colorado[8] have followed the doctrine laid down in *Kadderly* v. *City of Portland*.

On the other hand, it is well settled that the judiciary can declare void any act of the legislature which conflicts with some definite clause of the constitution.[9] It is even a duty of the courts to determine whether a statute passed by the legislature to protect the public morals, health and safety is in reality a legitimate exercise of the police power. As said by the court in *Mugler* v. *Kansas*:[10]

> "Courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry of whether the legislature has transcended the limits of its authority. If, therefore, a statute importing to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the

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[3] 44 Ore. 118, 74 Pac. 710 (1903).
[4] 14 S. D. 394, 85 N. W. 605 (1901).
[5] 36 S. D. 260, 154 N. W. 707, L. R. A. 1917B, 1 (1915).
[6] (S. D.) 178 N. W. 575 (1920).
[7] State *v.* Moore, 103 Ark. 48, 54, 145 S. W. 199, 202 (1912).
[8] Van Kleeck *v.* Ramer, 62 Col. 4, 156 Pac. 1108 (1916).
[9] Marbury *v.* Madison, 1 Cranch 137, 176 (1803).
[10] 123 U. S. 623, 661 (1887).

courts to so adjudge, and thereby give effect to the Constitution."

Among the states whose courts have allowed the judiciary to review the declaration of the legislature that an enactment should not be subject to referendum because an emergency existed are Missouri, California, Washington, Montana and South Dakota,[11] while Oklahoma[12] seems to be leaning in the same direction.

These courts base their conclusions upon the intendment and purpose of the referendum amendments. They contend that constitutional amendments providing for referendum have left no room for the exercise of discretion to the legislature when passing upon acts which are not and cannot, from their nature and subject matter, be held to be necessary for the immediate preservation of the public peace, health and safety. Such acts must be subject to referendum, and the mere fact that the legislature proclaims that they should come under the emergency clause should have no more effect than a declaration of that same body that an act is not unconstitutional. In short, these courts distinctly reserve to the judiciary the final decision of what laws are subject to referendum.

In the case of *State* v. *Meath*,[13] the court said:

"When, therefore, the question comes whether the Legislature has a right to declare an emergency which will take away the right of referendum, the doubt, if there be any, should be resolved in favor of the reserved power of the people instead of in the admittedly unwarranted declaration by the Legislature. And in so declaring the courts do not assume to say that the Legislature has abused its discretion. They go no further than to say that the Legislature cannot, by any act which is not clearly within its granted power, cut off the right of the people to say for themselves at an election to be held for that purpose whether its discretion has been abused, or no."

This view seems to be gaining favor,[14] and it seems safe to predict that those states not committed on this question will consider the true purpose of the referendum amendment and will not leave with the legislature the means to render such amendment a nullity. The latest case on this question is *State* v. *Becker*,[15] which permitted the judiciary to review. F. B. F., JR.

[11] *Dictum* in State *v.* Sullivan (Mo.), 224 S. W. 327 (1920); followed in State *v.* Becker (Mo.), 233 S. W. 641 (1921); State *v.* Meath, 84 Wash. 302, 147 Pac. 11 (1915); State *v.* Howell, 85 Wash. 281, 147 Pac. 1162 (1915); Hodges *v.* Snyder, *supra;* State *v.* Whisman, *supra;* State *v.* Stewart (Mont.), 187 Pac. 641 (1920); McClure *v.* Nye, 22 Cal. App. 248, 133 Pac. 1145 (1913).

[12] Oklahoma City *v.* Shields, 22 Okla. 265, 100 Pac. 559 (1908); *In Re* Menefee. 22 Okla. 365, 97 Pac. 1014 (1908); Riley *v.* Carrico, 27 Okla. 33, 110 Pac. 738 (1910).

[13] State *v.* Meath, *supra.*

[14] See note in L. R. A. 1917B, 28.

[15] State *v.* Becker, *supra.*